Supreme Court of the United States.

FREDERICK A. BELL,
Plaintiff in Error,

VERSUS

MARY G. BELL,
Defendant in Error.

Statement.

This is a writ of error to the Supreme Court of the State of New York. It runs to a judgment dissolving the marriage of these parties entered in that court, in the County of Erie, under a remittitur from the Court of Appeals. For brevity I will call the plaintiff in error Mr. Bell and the defendant in error Mrs. Bell. They were married in Bloomington, Illinois, January 24th, 1878, and lived a year or two in Rochester, New York, and then came to Buffalo, New York, where they resided until September, 1882, when Mrs. Bell left her husband's home, without just cause, and returned to her mother's house in Bloomington. Mr. Bell kept his home open in Buffalo fifteen months after her desertion, but she never returned to it.

Nearly twelve years after this, Mr. Bell, on April 9th, 1894, began an action in the Court of Common Pleas, Jefferson County, State of Pennsylvania, for an absolute divorce. Mr. Bell had formerly lived over seventeen years in this county, his coal mines were situated there, and he was a large employer of labor there; for a great many continuous years up to the date of his action fully one half of his time had he passed there. During all these twelve years Mrs. Bell had lived with her mother, in Illinois, excepting when she was in Europe (R. 14). She was not served with process in Mr. Bell's action within the State of Pennsylvania and she never appeared therein. The service was constructive, and when the service was completed she was still residing in Bloomington. She had

complete knowledge of the pendency of the action (R. 61) and referee's opinion (R. 19).

The Pennsylvania decree shows (R. 75 and 78) that the examiner set the first hearing for December 4th, 1894, in his office in Brookville, the county seat of Jefferson County. His report states (R. 78) that more than twenty days before said hearing he mailed a copy of said notice of hearing for December 4th, 1894, to Mrs. Bell at Bloomington, Illinois. It is as follows:

> "To Mary G. Bell:
>
> You are hereby notified that I will attend to the duties of my appointment in the above-stated case, at my office, on Main Street in the Borough of Brookville, in the County of Jefferson and State of Pennsylvania, on the fourth day of December, A. D., 1894, at 9.00 o'clock A. M., at which time and place you may attend if you see proper and wish to do so.
>
> November 3d, 1894. JOHN CONRAD, Examiner."

This notice is dated November 3d, 1894, so that by November 6th, or thereabouts, Mrs. Bell was aware of the date of hearing in the action, the pending of which she had been before informed by the construction service of process. This date is important as bearing on her flight into the State of New York to avoid the legal effect on her, as a resident of or as domiciled in Illinois, of the Pennsylvania decree, and also to begin her action against Mr. Bell, in New York, for divorce. This hearing set for December 4th, 1894, was adjourned, without taking any testimony, to December 13th, and again to December 19th, at which time the testimony was all put in. Mrs. Bell did not appear. I had taken particular pains to have knowledge of the action and hearing brought to her and was anxious she should appear. Mr. Bell and I were present at this hearing. Everything on his part was open and above board. Mr. Jenks, Solicitor-General under President Cleveland, was our counsel. The examiner's report is dated December 19th, 1894, but as no court was in session in that county until January, the judgment could not be entered until January 8th, 1895, which was in favor of Mr. Bell and dissolved his marriage with Mrs. Bell on the ground of desertion (R. 81). This is a ground for divorce, *a vinculo*, under the laws of the State of Pennsylvania and also of Illinois (R. 84).

In the meantime, Mrs. Bell, about November 14th, 1894, left the State of Illinois (R. 27) and came to the State of New York "with the avowed purpose of bringing this suit for divorce" (Referee's Opinion, R. 19). She was near Buffalo a few days prior to November 21st, and left for Brooklyn on that date (R. 29). She verified her complaint in Kings County December 10th, 1894, in which she sued Mr. Bell for an absolute divorce (R. 2). It was personally served upon Mr. Bell December 22d, 1894, five days after the hearing in Pennsylvania. As a defense to Mrs. Bell's New York action, Mr. Bell pleaded his Pennsylvania judgment which had dissolved by a valid judgment of divorce *a vinculo*, his marriage with Mrs. Bell. This judgment being pleaded in New York was held to be void.

The federal question is whether the courts of New York have given to the judgment of the Pennsylvania court the faith and credit to which, under Article IV. of the Constitution, and the laws of the United States of America, it is entitled.

The following is the judgment of Pennsylvania:

"IN THE COURT OF COMMON PLEAS OF JEFFERSON COUNTY.

FREDERIC A. BELL,
VERSUS
MARY G. BELL.

Of May Term, 18—. No. 225. Divorce.

"And now, January 8th, 1895, the Court having heard this case, and having fully considered and proceeded to determine the same as to law and justice appertain,

"Do sentence and decree, that the said Frederc A. Bell be divorced and separated from the nuptial ties and bonds of matrimony heretofore contracted between him, the said Frederic A. Bell, the libellant, and the said Mary G. Bell, respondent, and that thereupon all and every the duties, rights and claims accruing to either the said Frederic A. Bell, or the said Mary G. Bell, at any time heretofore in pursuance of said marriage, shall cease and determine.

"And further, the Court do award to the said Frederic A. Bell, against the said Mary G. Bell, his costs in this behalf expended.

By the Court,

[L. S.]

E. HEATH CLARK,
President Judge.

Attest:

W. D. CLARK,
Prothonotary."

That part of Mr. Bell's answer in New York which pleaded the Pennsylvania judgment, is as follows:

"SUPREME COURT, ERIE COUNTY.

MARY G. BELL,
AGAINST
FREDERICK A. BELL.

"The said defendant, by Henry H. Seymour, his attorney, answering the complaint herein, alleges, by his amended answer:

"Admitting the marriage in said complaint alleged, denies each and every other allegation contained therein. And for further defense the said defendant alleges that at the times hereinafter mentioned the Court of Common Pleas of Jefferson County, of the State of Pennsylvania, was a court of general jurisdiction duly created by the laws of that State. That on or about the 9th day of April, 1894, the defendant commenced an action in said court against said plaintiff for the dissolution of his said marriage with said plaintiff *a vinculo matrimoni*, by the issue of summons, which summons and notice or the process, by, virtue of which by the laws of the State of Pennsylvania jurisdiction is obtained over the defendant in actions at law in said State, was duly served upon the plaintiff herein, and the said Court of Common Pleas of Jefferson County had jurisdiction over the said plaintiff herein, as the defendant in that said action, or the pendency of which said action the plaintiff herein had personal and timely notice. That the hearing upon said action, or the trial thereof, was held in Brookville, in said County of Jefferson, in said State of Pennsylvania, on the 19th day of December, 1894, and such proceedings in said action were thereupon had; that said court heretofore, on the 8th day of January, 1895, duly adjudged and decreed that the marriage of the parties hereto in this complaint alleged be dissolved, and said defendant recovered judgment in said court against the plaintiff herein, the said defendant herein, dissolving said marriage, and by a judgment and decree of the said Court of Common Pleas of the County of Jefferson, and State of Pennsylvania, the marriage alleged in the complaint herein, between the parties hereto, was heretofore dissolved."

Mrs. Bell served a reply to this answer denying any knowledge, etc., as to the jurisdiction or creation of the Pennsylvania court, or of the proceedings therein, or that any process had

ever been served on her, and also that Mr. Bell was never a resident or citizen of Pennsylvania, and that said judgment was a fraud upon Mrs. Bell and the laws of said states (R. 8). On the trial, however, there was no proof whatever of any such *fraud* nor any findings of fraud made by the referee.

The federal question was raised by me in all the courts of New York. The referee reported in favor of Mrs. Bell, saying in reference to the Pennsylvania judgment: "The plaintiff (Mrs. Bell) *had notice of the action*, but did not appear in it or take any part in it. In that action a decree was rendered dissolving the marriage between the parties for the desertion of the defendant by the plaintiff. That decree was offered in evidence before me. It can have no force in changing the relations of the parties. The uniform course of decisions by the courts of our state forbid my giving any force to this decree" (R. 19).

Judgment on this report was entered in the County of Erie July 3d, 1895, in favor of Mrs. Bell, dissolving the said marriage.

This judgment was affirmed on appeal to the Appellate Division of the Supreme Court, with an opinion (R. 138). That judgment was affirmed by the Court of Appeals, without opinion, but not on the opinion of the Appellate Division, and its judgment was made the judgment of the Supreme Court January 13th, 1899 (R. 144).

Errors Assigned.

1. That the said judgment fails to give that faith and credit to the decree of the Pennsylvania court, to which, under the Constitution and laws of the United States, it is entitled.

2. That "full faith and credit" being given to the said Pennsylvania judgment under said constitution and laws, Mr. Bell was, at the time he served his answer in said action by Mrs. Bell against him in New York, not the husband of said Mary G. Bell, and she had no cause of action against him.

3. That the judgment against Mr. Bell, your petitioner of the New York court, is erroneous and violative of his rights under the Constitution and laws of the United States.

4. That said judgment is against the right of Mr. Bell.

ARGUMENT.

The Pennsylvania Judgment on its Merits.

This judgment was based on Mrs. Bell's desertion of Mr. Bell. The examiner's or referee's report therein is as follows:

"*To the Honorable, the Judges of the Court of Common Pleas of Jefferson County:*

"The undersigned Examiner, appointed by the Court, as per commission hereto attached, respectfully reports: That he was affirmed according to law; that he published due notice of the time and place of the hearing in this case, in the Jefferson *Democrat* and the Brookville *Republican*, published in Brookville, Jefferson County, in the State of Pennsylvania, and also posted a copy of said notice in a conspicuous place in the Prothonotary's office for more than twenty days, also mailed a copy of said notice more than twenty days before the hearing to Mary G. Bell, at Bloomington, McLean County, Illinois; a copy of said notice is hereto attached. In pursuance of said notice, the Examiner attended at his office, in the Borough of Brookville, in the county aforesaid, on the 4th day of December, A. D., 1894, at 9.00 o'clock, A. M., the time and place fixed for the hearing. C. Z. Gordon, Esq., appeared for the libellant, and on his application, on the ground of sickness of the libellant, the case was continued December 13, 1894, at 9.00 o'clock, A. M. At which time C. Z. Gordon, Esq., appeared for the libellant, and on account of the continued sickness of the libellant, the hearing was adjourned to December 19, 1894, at 9.00 A. M. At which time the libellant appeared with his attorneys, C. Z. Gordon, Esq., and Hon. George A. Jenks. The respondent did not appear; the testimony offered on the part of the libellant and taken by the Examiner at said hearing is hereto attached. From the testimony the Examiner finds the following facts:

"Frederic A. Bell, the libellant, and Mary Gridley, now Mary G. Bell, the respondent or defendant, were on the 24th day of January, A. D. 1878, at Bloomington, in the State of Illinois, married. Immediately after their marriage they lived together as husband and wife, in Rochester, New York. Subsequently they lived in a fine residence on Delaware Avenue, in Buffalo, New York. She was of an erratic, morose and jealous disposition. They have had no children. Her moods led to troubles in the family, induced by herself. The libellant was of an even, kind and considerate disposition; she made home unpleasant,

made it embarrassing to strangers visiting, and very embarrassing and unpleasant to the parents of the libellant to visit at their home. The libellant endeavored to make home happy and comfortable for her; he had a coachman hired to take her out driving from four to six times a week, but she would take sullen moods, when she would not speak to him, and she acted very ugly and cruelly to him sometimes. The respondent, Mary G. Bell, left her husband's home in Buffalo the first or second week in August, 1882, and went to Bloomington, Ills., and she returned about the first of September, 1882, accompanied by her mother, Mrs. Gridley. She stayed about a week, and she then left home, the house and habitation of her husband, accompanied by her mother, and told Mrs. Maggie Cashian, an employe in the house, that she was going away from there for good, and wanted Mrs. Maggie Cashian to leave at the same time, giving as the reason that it would look better if they both left at the same time. She said she was going to stay with her mother, in Bloomington, Illinois, and she was very much excited. Frederic A. Bell, the libellant, was away on business when she left. She never returned to Frederic A. Bell's society or home after she left at that time; she lived in Bloomington, Illinois, since she deserted the libellant; she left him and wilfully and maliciously deserted him without reasonable cause. Frederic A. Bell left Buffalo, New York, in March, 1893, and in March, 1893, he became resident of the Borough of Reynoldsville, in the County of Jefferson and State of Pennsylvania, and has been a resident there since, and also has since that time been a citizen of the State of Pennsylvania.

LEGAL CONCLUSION.

"The Examiner's opinion that the desertion of Mary G. Bell, the respondent, from Frederic A. Bell, the libellant, is, and has been of such a nature and character as to entitle the libellant to be divorced and forever separated from the nuptial ties or bonds of matrimony with Mary G. Bell, the respondent. The desertion having been without just cause and continued for over twelve years, there appears no good reason why a divorce should not be decreed. The Examiner, therefore, respectfully recommends the decree of divorce hereto attached, and he hereby certifies that he is not concerned as counsel for, nor related to, either of the parties in this proceedings, nor interested in the event thereof. All of which is respectfully submitted.

December 24, A. D. 1894. JOHN CONRAD,
Examiner."

Mrs. Bell's own witnesses, sworn in her behalf in her New York action, testified as follows on cross-examination, showing, without one word of evidence to explain or contradict it, that Mrs. Bell did desert Mr. Bell in Buffalo in 1882, without any cause whatever, even as she deserted Mr. Bruce in 1874 in Illinois, her first husband (R. 56).

Wherever desertion is a ground for divorce, Mr. Bell would have obtained judgment on such testimony.

I quote from the cross-examination of Maria Toomey, a maid in the Bell household and sworn for Mrs. Bell (R. 33), describing her departure in September, 1882, the time she left defendant for good:

> "Mrs. Bell bade us good-bye, she shook hands with us and said good-bye.
>
> "Q. Did she say she was coming back? A. She never said she was coming back.
>
> "Q. Did she say she was coming back? A. I don't remember she made use of them words. We knew she was going away.
>
> "Q. For good? A. Yes, sir.
>
> "Q. Why? A. I saw all her things packed up and of course I knew by her actions she was going away.
>
> "Q. Do you recall whether she said anything to you about going away for good? A. I guess she did. We all knew it anyway, that she was going away for good.
>
> "Q. Did you know it from her actions and conduct? A. Why certainly. I do believe Mrs. Bell told us she was going away and we could see it ourselves.
>
> "Q. See if you can remember whether she did tell you that she was going away for good? A. That is my recollection; that I knew distinctly that she was going away for good.
>
> "That she told you? A. Yes, sir."

The above is the testimony of the plaintiff's own witness. Further than that it is nowhere denied or explained in any way. No reason is given by the plaintiff why she left her husband's house. No fault of his is alleged or shown. On the contrary the testimony of Maggie Cashion at (R. 97) is:

> "I have never seen Mr. Bell in company, but as to his manner usually towards Mrs. Bell, I always seen Mr. Bell just the same as he always was, always quite pleasant."

This last witness, the cook in Mrs. Bell's house, testified (R. 94):

> "Mrs. Bell bade me good-bye when she left the second time. I don't know what she said. She said good-bye to me. She didn't say anything about when she would came back. She intended to stay home, I think.
>
> "Q. Did she say anything about leaving Mr. Bell then? A. She did.
>
> "Q. What was that? A. That she was going for good, she told me—I had a letter from a lady that I lived with in Montreal * * * and she told me I had better go to that lady. She said it would look better on her part if I were to leave Mr. Bell at that time. She did not say it would look better upon my part. I said I would stay with Mr. Bell, and I stayed with him a year and three months after that. All that time Mr. Bell kept open house. I never saw Mrs. Bell there again."

The date of Mrs. Bell's departure, above portrayed, was September, 1882. She thus sought to break up his home, by inducing the servant to leave him, giving as a pretext it would look better for Mr. Bell, because both leaving him at the same time it would appear as if the fault were his, when the fact was otherwise.

Directly before her departure forever, in September, 1882, Mrs. Bell went to Bloomington and visited her mother two weeks. Her own witness, Maria Toomey (R. 32–33) testified:

> "I remember Mrs. Bell's going to Bloomington. When she went she left a note for Mr. Bell. * * * She left a note for Mr. Bell, for to give it to him, to tell him she was going. I gave it to Mr. Bell; he was away when she left. When she left she said to me she was going to her mother's, and when Mr. Bell came back to give him this note. While she was in Bloomington, he packed up Mrs. Bell's things and sent them out to the barn, and some men came and packed up her piano."

Mrs. Bell left her husband's home with deliberation, and never returned, though he kept open house fifteen months thereafter. There is not one item of testimony showing that Mr. Bell's conduct was such as to justify her leaving his home; on the contrary, such glimpses as we get of their life in the testimony of Maggie Cashion, shows that she made life very unpleasant for her husband, and I quote parts thereof.

When Mrs. Bell was on the stand she did not deny or explain any of this testimony (R. 95, 96).

"Do you remember times when Mrs. Bell and Mr. Bell were living together, when she did not speak to him for days? A. As far as I could see I thought they were not speaking at times, but I don't know the reason; I remember times when Mrs. Bell wouldn't speak to Mr. Bell for days.

"Q. At such times, what was the expression on Mrs. Bell's face? A. Sometimes she looked pleasant, and sometimes she looked sad and troubled like.

"Q. Haven't you used other expressions in regard to that? A. She was excited; sometimes she looked pleasant, and sometimes troubled and excited-looking.

"Q. I am speaking of those times when they were not speaking to each other. She didn't look pleasant then, did she? A. No.

"Q. And in what was she excited? A. She would come into the kitchen and want to know where Mr. Bell was when he passed down-stairs; sometimes follow him into the cellar when he would go down cellar for his cigars, and sometimes into the barn, and then she would go into the front part of the house; she looked disagreeable and excited-looking. To the best of my recollection the longest time I have known any of them to last was a week, or three or four days. At these times she always seemed to have a suspicion of Mr. Bell, jealous like, as far as I could understand. I have never seen Mr. Bell in company, but as to his manner usually towards Mrs. Bell, I always seen Mr. Bell just the same as he always was, always quite pleasant. I have been present when Mrs. Bell acted unpleasantly to Mr. Bell; he offered her wine at the table, and she would not take any, and she acted ugly; I don't know as it was unpleasant; I don't know; I have seen her slam doors around the house when she left the room where he was."

The Illinois statute on divorce is as follows:

"Chapter 40, Section 1—Causes. Be it enacted by the People of the State of Illinois, represented in General Assembly. That in every case in which a marriage has been or hereafter may be contracted and solemnized between any two persons, and it shall be adjudged in the manner hereinafter provided, that either party at the time of such marriage was and continues to be naturally impotent; or that he or she had a wife or husband living at the time of such marriage; or that either party had com-

mitted adultery subsequent to the marriage, or has wilfully deserted or absented himself or herself from the husband or wife without any reasonable cause, for the space of two years, or has been guilty of habitual drunkenness for the space of two years, or has attempted the life of the other by poisoning or other means, showing malice; or has been guilty of extreme and repeated cruelty; or has been convicted of felony, or other infamous crime, it shall be lawful for the injured party to obtain a divorce and dissolution of such marriage contract."

The New York Decisions.

The New York Court of Appeals has so decided the various questions arising out of marriage and divorce, that the case law to-day has reached a wholly illogical condition uncontemplated by the decision in the Baker case in 1879. (People v. Baker, 76 N. Y. 78.) By this decision a man can have any number of wives, all living, all legal wives in the States wherein they were married, and he cannot be punished for bigamy in New York where he may reside with wife No. 2, in the next house to wife No. 1, etc., etc.

In the Baker case Judge Folger, as if troubled with his own logic, referred the final decision of this question to this court in this language:

> "We are aware that there are decisions of the courts of sister States to the contrary of the authorities in this State. They are ably expressed; they are honestly conceived. They are, however, on one side of a judicial controversy, the dividing line thereof is well marked, and is not lately drawn. It would not be profitable to review and discuss them. They are prevalent within the jurisdictions in which they have been uttered, and we cannot expect to change them there. They are in opposition to the judgments of our own courts, which we must respect, and with which our reason accords. It remains for the Supreme Court of the United States, as the final arbiter, to determine how far a judgment rendered in such a case, upon such substituted service of process, shall be operative, without the territorial jurisdiction of the tribunal giving it."

Since then all the New York cases have followed the Baker case. I showed in my Court of Appeals brief that not one of the cases, cited by Folger, J., in the Baker case, sustained his philosophy, the facts being so entirely different. His main

authority was Borden v. Fitch, 15 J. R. 121, date 1818. A Vermont divorce was pleaded by defendant based on constructive service, regular according to Vermont laws, but it appeared on the trial that the allegations of the bill were false because it said nothing about a decree of divorce by the Connecticut legislature against the plaintiff obtained by his wife, and under which she was living, but alleged she had deserted him, and the court held the divorce pleaded as a defense was obtained by fraud. In his opinion in this Borden case, Thompson, C. J., cited as his first and chief case Buchanan v. Rucker, 9 East 192, wherein the Court of Kings Bench declared that the law would not raise an *assumpsit* upon a judgment obtained in the Island of Tobago by default (and afterwards sued in London), when it appeared on the face of the proceedings that the defendant was not in the island when the suit was commenced, and that he had been summoned by nailing a copy of the declaration on the court house door.

Since then this Buchanan case has been decidedly distinguished in England in Schilsby v. Westerholz, 5 English Ruling Cases, 734.

This was an action in London on a French judgment obtained by default. The plea by the defendant was, never resident or domiciled in France, no appearance, never summoned, nor any notice or knowledge of pending of action. The plaintiff was a Dane, resident in France. The defendants were Danes, resident in London. A contract was made in London by which defendants were to ship in Sweden a cargo of Swedish oats to Caen, France. Plaintiff claimed the oats were short in quantity and defective in quality, and sued in the French courts. The method of serving the process is as follows: The summons is served on the Procureur Imperial. If the foreign defendant, so cited, does not appear within one month judgment may be given against him, but he may at any time within two months after judgment appear and be heard on the merits. After that lapse of time judgment is final. The practice of the imperial government in such a case is to forward the summons thus served to the consulate or the country where defendant is resident, with directions to intimate the summons, if practicable, to defendant, though this is not required.

The judgment obtained as above was regular, yet can it be

said, with such a service of process, that the decision of the English courts not to be bound by it should be applied to throw out the judgment of a sister State here?

Lord Blackburn, in delivering judgment in this case, referring to Buchanan v. Rucker and Lord Ellenborough's famous question, "Can the Island of Tobago pass a law to bind the rights of the whole world?" said, that Lord Ellenborough rested his judgment, not on that exclamation, but on the ground that laws passed by our country were not obligatory on foreigners not subject to their jurisdiction.

Lord Blackburn then proceeds to say:

> "The question we have now to answer is, can the Empire of France pass a law to bind the whole world? We admit, with perfect candor, that in the supposed case of a judgment obtained in this country against a foreigner under the Common Law Procedure Act, being sued on in a court of the United States, the question for the court of the United States would be, 'Can the Island of Great Britain pass a law to bind the whole world?' We think in each case the answer should be No, but every country can pass laws to bind a great many persons, and therefore the further question has to be determined, whether the defendant in the particular suit was such a person as to be bound by the judgment which it is sought to enforce?"

So in this Bell case, to be concrete, I think "the defendant in this particular suit," with an ~~Indiana~~ marriage to start with, with her ten years residence in ~~Indiana~~ after she left her husband in New York, with her leaving ~~Indiana~~ on November 14, 1894, directly upon receiving notice of the pendency of the Pennsylvania action against her, and her commencement of this action within a month, the summons being dated December 10, 1894, with her full knowledge of the pendency of the Pennsylvania action, which was not tried until December 19, 1894, is a defendant that should be bound by the decree pleaded in defense to her action. The Pennsylvania decree was granted for a cause which is also cause in Illinois.

I will briefly pursue the history of this apparently unconscious evolution by New York of its philosophy in the Baker case. In that case the court stood 6 to 1 against the foreign judgment. This was in 1879. In 1885, the O'Dea case, the New York court stood 4 to 3 against the foreign judgment,

showing in the advance of time a parallel advance towards right. When the Baker case was decided in January, 1879, there was no provision in the New York Code for serving a non-resident by substituted service, by publication, or mailing a marked copy to the defendant, of the summons. It only provided at that time that you could serve residents *of the State of New York* in that way, who for the time being were outside of the State, but immediately after this decision, and within three months, as if the Legislature had had this point in mind, amended the law for service of a summons in that respect, and from that time on provided for the service of a summons in a divorce case on a non-resident outside of the jurisdiction of the State, exactly the same as the State of Pennsylvania served Mrs. Bell in Mr. Bell's action. So that the law to-day stands changed in that respect from what the law was at the time of the Baker case. Judge Folger, in his opinion, pointed out that we did not provide for the service of a summons in a divorce case upon a non-resident outside of the State of New York, and he also said:

> "As we look at this case it presents this question: Can a Court in another State adjudge to be dissolved and at an end the matrimonial relation of a citizen of this State, domiciled and actually abiding here throughout the pendency of the judicial proceedings there, without a voluntary appearance by him therein, *and with no actual notice to him thereof*, and without personal service of process on him in that State," and the opinion goes on all through upon those fundamental principles with special mention of the middle proposition, "without actual notice to him thereof."

The New York Code provides further, we not only give a plaintiff a judgment for an absolute divorce, against a non-resident when the summons is served, by publication, outside of the State, but makes that judgment an exception from all other judgments which are obtained upon substituted service in not allowing a judgment for divorce to be opened within the statutory year, while allowing other judgments obtained upon substituted service to be opened that way.

The Court in the O'Dea case, upon the argument being made that that case should succeed because the defendant therein had had actual notice of the proceedings, and the case was

therefore organically distinguished from the Baker case, says in its opinion, "Per Curiam":

> "We think the case of People v. Baker is conclusive on the question brought up by this appeal. There are some differences in the detail of the circumstances of the two cases, but we think not enough to lead to any change in the result, nor sufficient to require a reconsideration of the law affecting it. This conflict of opinion" (referring to the judgments of the other States), "however much to be regretted, continues, and it yet remains for some ultimate authority to relieve the point from the difficulties now attending it, and determine the civil rights of parties whose relations are legally defined by different State tribunals."

Judge Danforth said, in his dissenting opinion in this case:

> "Where the jurisdiction of the Court rests only on the fact that the moving party had his domicile within such jurisdiction, its claim to recognition in other States rests upon the ground of comity, and this cannot prevail without giving the party affected an opportunity to be heard." And, "It is true that notice so served on a litigant, out of the jurisdiction in which a suit is pending, may add nothing to the judicial right to take cognizance over the cause, but, nevertheless, it may impart a quality to the resulting judgment that will serve as a credential to it in a foreign jurisdiction."

And in discussing service outside the State he says:

> "Indeed, as the object of all service is to give notice to the party on whom it is made, that he may be aware of, and may resist, the relief sought against him; when that is substantially done, so that the Court may feel confident that service has reached him, it would seem that everything has been done that is required.
>
> "This is said in Gibbs v. Ins. Co., 63 N. Y. 114, and is repeated in Pope's case, 87 N. Y. 137, 140, with the addition, that any service which reasonably accomplishes that end answers the requirement of natural justice and fundamental law. Indeed it is difficult to see how it could be otherwise. We hold it enough within the strictest rule to serve process upon a defendant, although he is in transit —passing through the State, neither abiding here, nor having any intention to remain. Of what less real and substantial efficacy for all beneficial purposes in the actual delivery of the paper outside the limits of the State? So, as against a domiciled citizen of a State, a judgment ren-

dered upon such substituted service is by the law of the State permitted, although he is in fact absent. And it is valid and binding upon him, though he is actually abiding in another State, and has neither appeared in the suit, nor had actual notice of it. His absence, whether temporary or prolonged, makes no difference.

* * * "It follows, I think, that the true and safe rule is as stated by Cooley (Const. Lim. 400)"—he is now discussing the residence of the wife—"that the actual *bona fide* residence of either husband or wife within a State will give to that State authority to determine the status of such party, and to pass upon any questions affecting his or her continuance in the marriage relation, and that the Courts of that State, authorized by its legislature to take cognizance of the subject, may lawfully pass upon such questions and annul the marriage for any cause allowed by the local law, that jurisdiction over the opposite party may be acquired in such manner as the legislature may direct, and whether by service in, or notice out of the State, or by publication, is sufficient to justify a decree changing the status of the complaining party, and thereby terminating the marriage. By holding otherwise we declare our own statutes (Code Civ. Pro. Sec. 438, Sub. 4, Sec. 1774), upon the same subject unavailing, and compliance with them a useless and idle formality." * * *

"And even if within that opinion the Courts of Ohio could not declare the status of the defendant in this State, it could and it did lift the yoke from off the neck of its citizen, relieved him from the *vinculum matrimonii*, and hence, although the parties to the former marriage still lived, one of them was confessedly relieved from all his marital obligations and legally disabled from enforcing those of the others. She had no husband, at least in the State where he lived. The contract was no longer binding upon him. It follows that the former marriage cannot be said to have been in force at the time of the marriage which is the subject of this action. When the statute speaks of a 'marriage then' (at the time of the second marriage) 'in force,' it must mean a marriage by which both parties are bound and as to which the relation of neither party has been changed." * * * "As I understand the Baker case, it concedes that this rule does not inexorably require either service of process or voluntary appearance, but may be satisfied when the party has in any way been given an opportunity of being heard before judgment, or, in the language of the third condition of the question stated (*supra*) in the Baker case, has had 'actual notice' of the judicial proceedings."

This Court will thus see how the Baker case has been followed to a degree not intended by its own parents, and how also in both cases the Court of Appeals seem to refer the question to the Federal Supreme Court to help it out of a vexed question.

As a vigorous challenge to the law of the Baker case by one of New York's judges, I quote the following opinion in Davis v. Davis (1893), 2 Misc. R. 549, a more recent Philippic, wherein Pryor, J., said:

> "As the marriage purporting to be dissolved was not celebrated in Massachusetts, as the defendant in the divorce suit was not domiciled in that Commonwealth, nor was served with process there, nor appeared in the action, it results that, by the law of New York, the judgment against her is of no effect; that she is still the wife of the defendant; and that, by necessary consequence, his marriage with this plaintiff is a nullity. * * * To this conclusion I am compelled, but I am not forbidden to say that my reason revolts against it. By the law of Massachusetts its court had jurisdiction of the defendant in the divorce suit, and the decree of the divorce is valid and conclusive. By virtue of the supreme law of the nation, 'a decree in divorce, valid and effectual by the laws of the State where obtained, is valid and effectual in all other States' (Cheever v. Wilson, 9 Wall, 109), and yet I am to declare this Massachusetts judgment a nullity. And why? Because the jurisdiction of the Massachusetts court rests solely on a constructive service of process by publication; and by the law of New York such service is of no avail. But such constructive service of process is the only foundation of the jurisdiction of this court in the present case; yet, by the law of New York such service gives jurisdiction to its court, and the judgment I am to render is not only valid, but of so transcendant an efficacy as to impeach the records and cancel the judicial proceedings of another State. In reason, such service of process should be sufficient in both States, or in neither.
>
> "Equally anomalous will be the effect of the judgment of this court on the relation and rights of the parties. In Massachusetts, not the former spouse, but this plaintiff, is the lawful wife of the defendant; while in New York the former spouse is still the wife of the defendant, and his connection with the plaintiff a crime. Indeed, relying on the nullity of the Massachusetts decree, the former wife has instituted here an action for divorce from the de-

fendant, on the allegation that his marriage with this plaintiff is an adulterous association. The executive of New York may demand from Massachusetts the rendition of the defendant as a bigamist; but can he be a bigamist whom Massachusetts has released from the former marriage? The absurd and mischievous consequences of the present judgment do not relieve me from the necessity of pronouncing it; but perhaps the exposition of them may not be amiss in the prevalent agitation for a uniform system of marriage and divorce. Judgment for plaintiff."

"The Faith and Credit" Section of the Constitution and Judgments In Rem and In Personam.

Article 4, Sec. 1 of the Constitution is:

"Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State; and Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

Congress thereafter passed the Act of May 26, 1790, which, after prescribing a mode in which the records and judicial proceedings of the courts of any State shall be authenticated, enacts:

"The said records and proceedings, authenticated as aforesaid, shall have such faith and credit given them, in in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or may be taken."

In Huntington v. Attril Mr. Justice Gray said:

"This clause of the Constitution, like the less perfect provision on the subject in the Articles of Confederation, as observed by Mr. Justice Story, 'was intended to give the same conclusive effect to judgments of all the States, so as to promote uniformity, as well as certainty, in the rule among them; and had three distinct objects; first, to declare, and by its own force establish, that full faith and credit should be given to the judgments of every other State; second, to authorize Congress to prescribe the manner of authenticating them; and third, to authorize Congress to prescribe their effect when so authenticated. Story on the Constitution, Sections 1307, 1308.' Congress, in the exercise of the power so conferred, besides prescribing the manner in which the records and judicial proceedings of any

State may be authenticated, has defined the effect thereof, by enacting that 'the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.' Rev. Stat., Section 905, re-enacting Act of May 26, 1790, c. 11, 1 Stat. 122." (146 U. S. 684-685.)

The effect, to be given in one State to the judgment of a court of another State, is the same as the effect, given by the courts of the State where such judgment was rendered, to that judgment. (Renaud v. Abbott, 116 U. S. 277; Hanley v. Donoghue, 116 U. S. 1.)

"By the settled construction of these provisions of the Constitution and Statutes of the United States a judgment of a State court in a cause within its jurisdiction and against a defendant lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to such force and effect against the person summoned or the property attached when the question is presented for decision in a court of another State as it is in the State in which it was rendered.

Judgments recovered in one of the States of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable upon the merits nor impeachable for fraud in obtaining them if rendered by a court having jurisdiction of the cause and of the parties."

In Mills v. Duryee, February, 1813, U. S. Supreme Court, 2 Am. Leading Cases, 725; 7 Cranch. 481. Error to the Circuit Court for the District of Columbia in an action of debt upon a judgment of the Supreme Court of the State of New York, to which defendant below pleaded *nil debet*, which plea, upon demurrer, adjudged bad.

STORY, J.:

"It is argued that this act, Article 4, U. S. C., Sec. 1, provides only for the admission of such records as *evidence*, but does not declare *the effect* of such evidence when admitted. This argument cannot be supported. The act declares that the record, duly authenticated, shall have such faith and credit as it has in the State Court whence it is taken. If in such court it has the faith and credit of evidence of the highest nature, viz., *record evidence*, it must have the same faith and credit in every court.

"It only remains, then, to inquire in every case what is the effect of the judgment in the State where it was rendered. In the present case the defendant had full notice of the suit, for he was arrested and gave bail.

"The pleadings in an action are governed by the dignity of the instrument on which it is founded. If it be a record conclusive between the parties, it cannot be denied but by the plea of *nul tiel record*, and when Congress gave the effect of a record to the judgment, it gave it all the collateral consequences. The law is undoubted that an exemplification is decisive. The original need not be produced. Counsel contends the judgment of the State Courts ought to be considered *prima facie* evidence only. If so, this clause in the constitution would be utterly unimportant and illusory. The common law would give judgments precisely the same effect. It is manifest that the Constitution contemplated a power in Congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the act of Congress, unless it declare a judgment conclusive when the court of a particular State where it is rendered would pronounce the same decision."

Article IV is Mandatory.

My contention, under Article 4, is that it is mandatory upon this court to declare the Court of New York *shall* give validity or full faith and credit to the Pennsylvania judgment — not faith and credit alone, but *full* faith and credit, such judgment being regular and valid in Pennsylvania and never attacked there, and no fraud being therein found by the New York Court. The word "full" in this Article was not idly used by the masters who framed the Constitution. It means what it says, and "full" can only mean vital, virile, real "faith and credit" that carries with it just that effect *everywhere* in the sisterhood of States that Article 4 was drafted to secure.

Unless it is construed as mandatory then is Article 4 perfunctory and of no real force and effect. It was drawn to prevent conflict of laws, conflict of States, modes of evasion by States of other State laws, unless its place in the Constitution is made *faineant*, like the Clovingian kings, by some other construction.

"In Rem."

If, however, a suit for divorce is an action *in rem*, then the Pennsylvania judgment is binding under the decisions already made by this court. The following authorities hold the Pennsylvania judgment was *in rem*. The *res* was the *status*. The court there acquired jurisdiction of the parties by the presence of the *status* in the person of Mr. Bell.

Rigney v. Rigney, 127 N. Y. 408.
1 Greenl. Ev. 525.
Bishop Mar. & Div., II Vol., Secs. 20, 23, 26, 27, 183.
Garner v. Garner, 56 Md. 127.
Bunnell v. Bunnell, 25 Fed. 214.
Harding v. Allen, 9 Greenl. 140.
Black on Judgment, 2nd Vol., Sec. 822.
Freeman on Judgments, Vol. 1, Sec. 313. Vol. 2, Secs. 606, 584, 586.
Niboyet v. Niboyet, 4 P. D. 1–12.
Ellison v. Martin, 53 Mo., 575–578.
2nd Smith's Leading Cases, 6 Amer. Ed. 670.
Da Costa v. Villa Real Strange, 691.
Bunting's Case, 4 Coke, 29.
Kerns Case, 7 Coke, 42.
Meddowcroft v. Huguenin, 4 Moore, 386.
Peny v. Meddowcroft, 10 Beav. 122.
Hood v. Hood, 110 Mass. 463.
Smith v. Smith, 13 Gray, 209.
In re Newman, 75 Cal. 213.

The New York Court of Appeals held in Rigney v. Rigney (*supra*), which was reversed by this court upon another point, that a suit for divorce, though not strictly a proceeding *in rem*, is of the nature of such a proceeding or *quasi in rem*, in so far as it effects the marital status of the parties; but as to alimony and costs it is a proceeding *in personam*.

It also holds each State can determine the *status* of its own citizens, but such determination has no effect beyond such State. Whither leads such logic?

If the court had jurisdiction its decision as to the *status* should be binding everywhere, unless shown to be a judgment

coram non judice, and so void everywhere. *It is binding everywhere or void everywhere. Reason can survive no other logic.*

Divorce then, in so far as it effects the marital *status* being *in rem*, the doctrine laid down by Mr. Justice Field in Pennoyer v. Neff should enforce our Pennsylvania decree in New York:

> "Except in cases affecting the personal *status* of the plaintiff, or where the judgment is sought as a means of reaching property within the State, or affecting some interest therein — in other words, where the action is of a nature of a proceeding *in rem*, substituted service is not effectual.
>
> Pennoyer v. Neff, 95 U. S. 714.

> "The granting of divorces being within the competency of the legislature of the territory, its motives in passing the act in question (divorcing the parties) cannot be inquired into. Having jurisdiction to legislate upon the status of the husband, he being a resident of the territory at the time, the validity of the act is not effected by the fact that it was passed upon his application and without notice to or knowledge by his wife, who, with their children had been left by him two years before in Ohio, under promise that he would return or send for them."
>
> Maynard v. Hill, 125 U. S. 190.

This case came up on appeal (October, 1887) to this court from the Territory of Washington. At the time of obtaining his divorce Maynard was a resident of that part of the Territory of Oregon, which, at the time of the action of Maynard v. Hill, was part of Washington Territory, and not part of the State of Oregon.

In this respect, therefore, a decree of the only court empowered to grant divorces in the Territory of Oregon, in 1852, was set up as a bar to an action brought in the Territory of Washington, and its validity was sustained, though there was no service within the State to the defendant, or any notice whatever.

In Gould v. Crow, 57 Mo. 200, the Court says:

> "When a husband or wife is domiciled within a particular State the courts of that State can take jurisdiction

over the *status* and for proper cause as on this *rem*, and dissolve the relation. The decree so pronounced is a judgment *in rem*, and when not affected by fraud, is valid anywhere, and under the Constitution of the United States such decrees are entitled to full faith and credit in all States and Territories. But such judgments when rendered on orders of publication can only have effect on the thing acted on by the decree, and such rights as are dependent upon that for existence. Therefore if the court on severing the marriage tie undertakes to render a decree *in personam* as to alimony it can have no extra territorial effect. But the marriage *status* being acted upon and dissolved by the decree, the relation becomes severed and continues so in all other States and Territories, and property rights dependent alone upon its continued existence must cease, not only within the State where the divorce was rendered but in all other dominions."

This court has always held that marriage is not simply a civil contract but is a relation and a *status*, and the procedure dissolving it is distinct from those affecting other contracts. In the Darmouth College case, it said:

> "The provision of the Constitution never has been understood to embrace other contracts than those which respect property or some object of value and confer the rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorce." (4 Wheaton, 629.)

In Cheever v. Wilson, 9 Wall. 123, the Court said:

> "It is said the petitioner went to Indiana to procure the divorce, and that she never resided there. The only question is as to the reality of her new residence and change of domicile. That she did reside in the county where the petition was filed is expressly found by the decree. Whether this finding is conclusive or only *prima facie* sufficient is a point on which the authorities are not in harmony. We do not deem it necessary to express any opinion upon the point. The finding is clearly sufficient until overcome by adverse testimony. None adequate to that result is found in the record. Giving to what there is the fullest effect, it only raises a suspicion that the *animus manendi* may have been wanting. It is insisted that Cheever never resided in Indiana; that the domicile of the husband is the wife's, and that she can not have a different one from his. The converse of the latter proposi-

tion is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues. The proceedings for a divorce may be instituted where the wife has her domicile. The place of the marriage, of the offense, and of the domicile of the husband are of no consequence."

In Pennoyer v. Neff, this Court said:

"To prevent any misapplication of the views expressed in his opinion, it is proper to observe that we do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the status of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident. The jurisdiction which every State possesses to determine the civil status and capacities of all its inhabitants involves authority to prescribe the conditions on which proceedings affecting them may be commenced and carried on within its territory. The State, for example, has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved. One of the parties guilty of acts for which by the law of the State a dissolution may be granted may have removed to a State where no dissolution is permitted. The complaining party would, therefore, fail if a divorce were sought in the State of the defendant; and if application could not be made to the tribunals of the complainant's domicile in such case, and proceedings be there instituted without personal service of process or personal notice to the offending party, the injured citizen would be without redress. Bishop on Marriage and divorce, Section 156."

In Cheeley v. Clayton, 110 U. S. 701–705, Mr. Justice Gray, delivering the opinion of this Court, said:

"The courts of the State of the domicile of the parties doubtless have jurisdiction to decree a divorce in accordance with its laws for any cause allowed by those laws, without regard to the place of the marriage or to that of the commission of the offense for which the divorce is granted; and a divorce so obtained is valid everywhere. (Story, Conflict of Laws, Sec. 230a; Cheever v. Wilson, 9 Wall. 108; Harvey v. Farnie, 8 App. Cas. 43.) If a wife is living apart from her husband without sufficient cause,

his domicile is in law her domicile; and in the absence of any proof of fraud or misconduct on his part, a divorce obtained by him in the State of his domicile, after reasonable notice to her, either by personal service or by publication in accordance with its laws, is valid, although she never in fact resided in that State. (Burlen v. Shannon, 115 Mass. 438; Hunt v. Hunt, 72 N. Y. 218.) But in order to make the divorce valid, either in the State in which it was granted or in another State, there must, unless the defendant appeared in the suit, have been such notice to her as the law of the first State requires."

Text Writers on "In Rem."

Bishop on M., D. and S., vol. 2, secs. 137 and 153, says divorce operates *in rem*.

"Where only the applicant for a divorce is before the Court, and the defendant is domiciled in another State, a decree reducing such applicant's *status* from marital to non-marital, operating thus *in rem* and not *in personam*, has no element whereof either the other married party, or the State of his domicile, is entitled to complain.

"By the very fact that the parties are permanently dwelling *animo non revertendi*, within different sovereignties, the marriage has ceased to be of any practical effect; it exists only in theory of law.

"There is no ground, therefore, for the one State, or for the party domiciled in it, to object when the other State chooses to change its theory of law as to its party, and hold him not to be married.

"As the laws of our States—at least most of them—now are, a married man who has ceased to have a wife, is not married.

"After an *ex parte* divorce rendered upon a mere constructive notice, the defendant being domiciled in another State and not in fact appearing, the latter's *status* still remains to the determination of his State, not that of the State in which his divorce was granted. For in the right to fix the *status* of the citizen the two States stood and still stand equal. Now there are various ways in which a married *status* may be created, adjusted or terminated. The exceptional one is by a decree of the Court. Commonly the *status* is created by an act *in pais* termed a marriage ceremony. Ordinarily it is dissolved by another act *in pais*, death. The rule is universal in all times and countries that when a married man has ceased to have a wife, or *vice versa*, the marriage *status* is at an end. It

makes no difference whether the loss of the consort comes by death or divorce. If the divorcing court had no jurisdiction whatever over the defendant, yet it could and did reduce the plaintiff's *status* from marital to non-marital, the defendant in the other country would simply be bound by it to the same extent as if the decree of dissolution were rendered by death, yet no further. The law of defendant's domicile would be no more outraged in the one case than in the other. It would still remain true at the defendant's home, that the man who has a wife is a married man, and the one who has none is not.

"Rejecting some judicial dicta not amounting to decision, more or less adverse, and not taking into the account such cases as the early North Carolina one now overruled, the present clear American doctrine, made conclusive by decisions of the court of ultimate resort, accepts *ex parte* divorces pronounced by the court of the applicant's domicile in full compliance with the local law, after its constructive notice to the absent defendant, as adequate everywhere to dissolve or otherwise ascertain the marriage status."

Greenleaf on Ev., Sec. 525, says:

"An apparent exception to this rule as to the identity of the parties is allowed in the cases usually termed proceedings *in rem*, which include not only judgments of condemnation of property as forfeited or as prize in the Exchequer or Admiralty, but also the decisions of other courts directly upon the personal status or relations of the parties, such as marriage, divorce, bastardy, * * * and the like. These decisions are binding and conclusive not only upon the parties actually litigating in the cause but upon all others * * * partly upon the more general ground of public policy and convenience, it being essential to the peace of society that questions of this kind should not be left doubtful, but that the domestic and social relations of every member of the community should be clearly defined and conclusively settled and at rest."

Freeman on Judgments, 585, says:

"The conclusions which are sustained by a decided majority of the cases are very clearly and correctly stated by Mr. Cooley in his work on Constitutional Limitations, in the following language: 'We conceive the true rule to be that the actual *bona fide* residence of either husband or wife within a State will give to that State authority to determine the status of such party, and to pass upon any

question affecting his or her continuance in the marriage relation, irrespective of the locality of the marriage or of any alleged offense, and that any such court in that State as the legislature may have authorized to take cognizance of the subject may lawfully pass upon such questions and annul the marriage for any cause allowed by the local law. But if a party goes to a jurisdiction other than that of his domicile for the purpose of procuring a divorce, and has residence there for that purpose only, such residence is not *bona fide*, and does not confer upon the courts of that State or country jurisdiction over the marriage relation, and any decree they may assume to make would be void as to the other party.'"

In Black on Judgments it is said, sec. 925 to 932:

"In the first place, a proceeding in divorce is a proceeding *in rem*. It is not an action by the petitioner against the defendant, at least not primarily. It is a proceeding by the petitioner to obtain an adjudication upon his or her marital status, which is the *res;* and the person who has the nearest interest in that status, and whose acts are alleged to have given rise to a cause for its dissolution, is named and cited as defendant. In the next place, it is an admitted principle of international law that every State has the sole and paramount right to legislate and adjudicate upon the status of its own domiciled citizens, and to regulate and determine their domestic relations. These two principles will furnish the key to the whole subject. For, accepting them as true, it at once becomes apparent that the jurisdiction in divorce must depend solely upon the domicile of the parties—upon the power to adjudicate upon their status—and not upon any question of service of process.

"If both the married parties are *bona fide* domiciled citizens of a given State, there can be no question of the power of the courts of that State to divorce them. It is immaterial that the marriage was celebrated in another State, and that the laws of such other State do not recognize the cause alleged as sufficient ground for granting a divorce. Wherever the parties go they carry their status with them, and it becomes subject to the jurisdiction of any State in which they acquire an actual domicile. And the causes for altering or dissolving that status must be determined by the laws of the State which has present jurisdiction over it, not by the laws of the State where it originated. Further, in this case, it is immaterial where the offense was committed which is alleged as ground for divorce. If both parties were domiciled in one State, and

the offense charged was perpetrated there, and both afterwards remove to another State and acquire a domicile there, the latter State has jurisdiction to dissolve the marriage on the ground of such offense. Here again it is the law of the State having control of the status which must govern, not the *lex loci delicti*.

"It now remains for us to consider the case in which the petitioner is a domiciled citizen of the State where the proceedings in divorce are taken, and the defendant is domiciled elsewhere. And on the admitted principle that each State has the right to determine the status and the domestic relations of its own citizens, the conclusion appears irresistible that the *bona fide* presence of the *res* —the status of a domiciled citizen—should give its courts jurisdiction. If this were not so, neither of the two States in which the parties are respectively resident, nor both together, could exercise this unquestioned right. But the question, though easily soluble on purely logical grounds, may also be treated as one settled by authority. And the decided weight of authority is in favor of the rule here contended for. In this connection it must be observed that the usual rule, that the domicile of the wife follows that of the husband, does not apply in these cases. For the purpose of petitioning in divorce, she may have a separate domicile. The law will recognize her as having a separate existence, and separate rights and interests, in all cases where the very object of the proceeding is to show that the relation itself ought to be dissolved, or so modified as to establish separate interests, and especially a separate domicile and home.

"If it be conceded that a divorce proceeding is a proceeding *in rem*, it will necessarily follow that actual and personal notice to the defendant is not indispensable. The vital requisite is the jurisdiction of the *res*. And power and authority over the *res*, as we have shown, depends upon the actual and *bona fide* domicile of the petitioner within the State. This being secured, it is immaterial that the other party is only constructively notified of the institution of the proceedings. The citation should be the best that the circumstances permit, and such as will tend to prevent fraud. But it is by no means necessary that it should be the same as is required to justify a judgment *in personam*. This rule is sustained by a great preponderance of authority, as will appear in the next section.

"Although the foregoing arguments have generally been accounted complete and irrefragable, yet some of the courts, while conceding one or more of the separate points,

have refused to accept the conclusion to which the whole line of reasoning logically and inevitably leads. Thus the books exhibit a few decisions, and some dicta, to the effect that a decree of divorce against a non-resident, founded upon a merely constructive service of process, as by publication, is void and of no effect. But some of these cases have been overruled; others have been tacitly repudiated, and the true and fundamental principles governing the question have become more and more clear to the courts and have gained weight with the increasing body of decisions. So that now the rule be regarded as settled, by the great preponderance of authority, that a decree of divorce pronounced by a competent court, in favor of a *bona fide* domiciled citizen of the State and against a non-resident, where service of process was made by a reasonable constructive notice, and in the absence of any fraud or collusion, is valid and binding both in that State and in all other States."

The English Cases.

I will not go into the English cases. Lolley's case, the Farnie case, and all the others are not important here. I have cited (*supra*, p. 12) what is more to the point here, Schilsby v. Westerholz, overruling Buchanan v. Rucker, the foundation stone of Borden v. Fitch, and the Baker case.

All these English cases contain law with which I have no dispute. Judgments sued upon in London, coming from all parts of England's empire, from China, Ceylon, Cypress, Asia and Africa, and even the Island of Tobago, are not parallel cases to judgments of our sister States, under Article 4 of our Constitution. We have out-Englished the English on this question, with the usual result. England says now, not in the language of New York's cast-iron philosophy, but in words like these, in the case above quoted:

"'Can the Island of Great Britain pass a law to bind the whole world?' We think in each case the answer should be No, but every country can pass laws to bind a great many persons, and therefore the further question has to be determined, whether the defendant in the particular suit was such a person as to be bound by the judgment which it is sought to enforce?"

So in this case, to be concrete, I think "the defendant in is particular suit," with an ~~Indiana~~ marriage to start with, th her ten years residence in ~~Indiana~~ after she left her hus- id in New York, with her leaving ~~Indiana~~ on November 14, 4, directly upon receiving notice of the pendency of the Pennsylvania action against her, *to avoid its legal effect on her in Illinois*, and her commencement of this action within a month, the summons being dated December 10, 1894, with her full knowledge of the pendency of the Pennsylvania action, which was not tried until December 19, 1894, is a defendant that should be bound by the decree pleaded in defense to her action.

Mr. Bell's Domicile.

The plaintiff's reply alleges Mr. Bell never became a resident of Pennsylvania, and that any pretended proceedings taken by him there were a fraud upon the rights of Mrs. Bell and upon the laws of the two States (R. 8).

Upon the trial of the action not one word of testimony was introduced by plaintiff to sustain these allegations — not one. No reference even was made to Mr. Bell's residence in any way by any witness, or by counsel.

What occurred was this (R. 42). Mrs. Bell's attorney said:

> "I want to introduce in evidence *some records bearing upon the question of alimony*. I first offer in evidence the petition and affidavit in the matter of the probate of the will of Alfred Bell," etc.

This was received under objection as Exhibit "C."

Counsel then said:

> "I also offer in evidence the petition for the probate of the will of Julie Bell, the mother of the defendant, in which the value of the estate is stated," etc.

This was admitted under objection as Exhibit "D."

Counsel then said:

> "I also offer in evidence certified copy of the decree fixing the value of the property under the will of defendant's father, subject to the inheritance tax," etc.

This was admitted under objection as Exhibit "E."

The record contains this statements (R. 47):

> "None of said Exhibits, 'C,' 'D' and 'E,' or above decree fixing value of the property, were read before or after being offered in evidence *until the summing up by plaintiff's counsel.*"

Then he read for the first time the affidavit (fol. 158) attached to Exhibit "D," as to defendant's residence.

This was the first I knew of its existence or the claim of counsel that he sought to introduce such exhibits for any other purpose than the limitation which he gave them in offering them in evidence. The record shows that at this point the following occurred (R. 129):

> "I ask leave to open defendant's case, and call Mr. Bell, and I offer to show by him that he did not read the joint petition for the probate of his mother's will signed by himself and his sister. I also offer to show that he was told by his attorney, who drew the petition, that it simply stated the facts of the mother's death, residence, etc., and that he did not know it contained any reference to his own residence; that he would not have made the affidavit had he known the petition stated he was a resident of this State, because such was not the fact."

Plaintiff's counsel objecting, the referee said:

> "If I thought it were of any importance in defendant's case, I would allow you to open it, *but I do not think the testimony of any importance.* I also sustain plaintiff's objection on the ground that the testimony included in the offer is incompetent."

Exception to defendant. The referee *held the testimony of no importance*, yet upon it, surreptitiously introduced as it was, he bases his eighth finding, that defendant was not a *bona fide* resident of Pennsylvania.

This finding was the act of a hostile referee, whose hostility to Mr. Bell was unknown at the time I agreed upon him as referee. A just referee when he saw how we had been surprised and deceived by counsel's offer would have said, "You may reopen your case. I want to hear all I can about this." Instead, the referee said, "*I do not think the testimony of any importance.*" By that remark I was further mislead, our testimony was shut out, and days after the referee makes that finding, a perfectly unjust and unsustained one, unnecessary,

too, because the law of the Baker case would defeat us in New York, and also legally unnecessary for all the decisions hold the Pennsylvania decree could not be attached collaterally by such a finding, based on such testimony.

I had a right to explain this affidavit. If, for instance, witnesses had testified that Mr. Bell had sometime told them he was not a resident of Pennsylvania, or was never there, it would be competent for him to deny this.

As regards the validity in New York of the decree of a court of competent jurisdiction in a sister State, the *status* of the parties within that State, and the question whether they, or any of them, were residents of that State, for the purposes of such decree, are to be determined by that court, and that determination cannot be questioned collaterally in New York.

Kinnier v. Kinnier, 45 N. Y. 535.

The defendant in the above case, in her answer, *denied that her husband ever became a resident of* Illinois, but that he went there with a view of claiming the benefit of the laws of Illinois in divorces, and that he was in fact a resident of New York.

Judge Church in his opinion said (at page 540):

> "Viewing them (the above allegations in the answer) in the most favorable light, the question is presented whether the Illinois decree can be attacked in this State in a collateral action, because the plaintiff in that action was not actually a *bona fide* resident of that State at the time? I think not. It is conceded he was there, appeared in that court and filed his bill and took the decree. The question whether he was a resident there, so as to enable him to file his bill, was for that court to determine, and although it may have decided erroneously, the decision cannot affect the validity of the judgment. The *status* of all persons within a State, is exclusively for that State to determine for itself. * * * A wrong decision does not impair the power to decide, or the validity of the decision when questioned collaterally. Every judgment may be impeached for fraud or want of jurisdiction, and this rule applies as well to judgments of other States as to those rendered in our own. *But there must be facts* which show it to be against conscience to execute the judgment, and which the injured party could not make available in a court of law, or which he was prevented from presenting by fraud or accident, unmixed with any fraud or negligence in himself or his agents."

In Laing v. Rigney (reversing upon another point Rigney v. Rigney, 127 N. Y. 408), decided by this Court January 13, 1896, this Court quotes and approves Nash v. Williams, 87 N. S. 226, which says:

> "The settled rule of law is that jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud. Every intendment is made to support the proceeding. It is regarded as if it were regular and irreversible for error. In the absence of fraud no question can be collaterally entertained as to anything lying within the jurisdictional sphere of the original case. Infinite confusion and mischief would ensue if the rule were otherwise."

Mr. Bell made his domicile in Pennsylvania in 1892. All his property was in that State and he had lived there for fifteen years before coming to Buffalo. The plaintiff's testimony shows him at his coal mines in Pennsylvania more than six months in every year even while residing in Buffalo. He was the best known man in that county, where he was the largest soft coal miner in America, employing four thousand men. It was his natural domicile after his home had been broken up. Even the referee, in his opinion (R. 19), concedes him a nominal residence in Pennsylvania, and that being conceded, the authority of Hunt v. Hunt, 72 N. Y. 217, makes it impossible to question the jurisdiction of the Pennsylvania court over Mr. Bell.

The referee says (fol. 57):

> "No evidence was offered to show that the defendant actually changed his domicile from this State to Pennsylvania."

This is a fair sample of the referee's state of mind towards Mr. Bell. It was not necessary to introduce such evidence, until some evidence attacking the Pennsylvania judgment had been put in by plaintiff, and, as I have said, this affidavit was secretly introduced. The petition for probate, to which it was attached was prepared in ex-Postmaster-General Bissell's office by clerks who knew nothing about Mr. Bell's matters, Mr. Bissell being the lawyer of Mr. Bell's firm and of his sister,

Mrs. Lewis, and so drew the petition for her, while I was Mr. Bell's counsel in other matters.

In this way the mistake occurred. Every lawyer knows that business men immersed in as large affairs as Mr. Bell never read carefully such papers. They take a clerk's word as to the substance.

Mr. Bell was in Pennsylvania all this period. I was present with him on December 19, 1894, at the trial of his action, at Brookville.

There is no finding by the referee of any fraud in procuring the Pennsylvania judgment.

He does not find Mr. Bell a resident of New York, or any other place, in fact, for that matter.

I argued this exception fully before the Appellate Division. I called its attention to this grave injustice, this stigma put upon the name of one of the most prominent, and honorably prominent, business men who ever lived in Buffalo, by a finding based upon testimony *secretly* and misleadingly introduced, without chance to explain or contradict, but the Appellate Division never, in its opinion, referred to the said exception, or otherwise noticed it. Afterwards Judge Green of said Court stated to me that the Court did not refer to this finding because where they were going to beat a party on the law or on a greater question they did not go into the lesser ones. I was ready upon the trial to litigate the question of fraud set up by plaintiff's Reply, but, as I have said, during the whole trial not one bit of testimony was offered by plaintiff upon this point.

The fact was, Mr. Bell had taken up in Pennsylvania in 1892 that residence which establishes the relation between the man and the State, and creates domicile, while his presence in Buffalo, uncertain as it was (where one of his business offices was), was like the residence of Mr. Platt in New York City in the quarantine case. "Residence and domicile are two perfectly distinct things," said Lord Westbury, as cited in People v. Platt, 50 Hun, 460. All that the surrogate's petition recites against Mr. Bell is the statement that his *residence* was Buffalo.

Under the decisions, then, the finding of the referee that defendant was not a *bona fide* resident of Pennsylvania has no effect whatever upon the merits of the law question raised by this record.

Mrs. Bell's Domicile.

Mrs. Bell left Mr. Bell September, 1882, and returned to her mother's house to live, in Illinois. From that date until November 14, 1894 (fol. 83), she lived continuously in Illinois, excepting when in Europe (fol. 80).

This makes her, up to that date, a resident of Illinois, under the decision in Matter of Florence, 54 Hun, 328; affirmed, 119 N. Y. 661. This case held where a wife left her husband in New York and returned to Philadelphia and lived there apart from him for twelve years, that she acquired a domicile apart from her husband's and had returned to her domicile of origin.

Her brother, a deeply interested party, testified under objection that Mrs. Bell had made declarations to him that she was a resident of Buffalo (R. 27). A deed was offered in evidence (R. 51), dated November 17, 1883, whereby Mr. Bell sold his home fifteen months after her desertion, in which, of course, she had to be joined, and in which her residence is referred to as Buffalo. Mr. Ansley Wilcox, who drew this deed, testified (R. 105) that he "drew the description out of his own head;" *that he did not know where Mrs. Bell was, and had no instructions from her, and that he drew it at the request of Mr. Rumsey.* There is, therefore, no competent testimony upon her domicile save that to be deduced from the fact of her returning, in 1882, to her domicile of origin.

Domicile is of three kinds: First, domicile of origin or nativity. Second, domicile of choice, which is voluntarily acquired. Third, domicile by operation of law, as that of a wife arising from marriage.—*Century Dictionary.*

Domicile depends, not upon citizenship or presence, but upon the concurring of two elements: First, residence in a place. Second, the intention of the person to make that place his home.—*Century Dictionary.*

The burden of proof is upon the party who asserts the change. It is rather a question of fact than of law.

Dupuy v. Wurtz, 53 N. Y. 556-561.

This change must be *animo et facto*, and the burden of proof unquestionably lies on the party who asserts the change.

A. and E. Encyl. of Law, Vol. 5 p. 865, and cases cited.

Nothing is better settled with reference to the law of domicile, than that domicile can be changed only *animo et facto*, and although residence may be decisive as to the *factum*, it cannot, when looked at with reference to the *animus*, be regarded as otherwise than as an equivocal act.

A. and E. Encyl. of Law, Vol. 5 p. 877, Note 1.

There is no doubt that Mrs. Bell received the examiner's notice of hearing early in November, 1894, and that at or before that time the construction service of the process upon her was complete. It is dated November 3, 1894 (R. 232). The examiner's report stated he mailed a copy of said notice to Mrs. Bell twenty days before the date of hearing, which would be November 14, 1894, and if he mailed it about the time it is dated, as is probable, she would have received it about November 6th.

Mrs. Bell's friend, Mrs. Jewett, testified (R. 29) that Mrs. Bell left her home in Jewettville, N. Y., November 21st, after a four or five days' visit, and the referee, in his opinion (R. 19) says Mrs. Bell "returned to this State with the avowed purpose of bringing this suit for divorce."

Therefore, Mrs. Bell, having received notice in Illinois, where she had resided for over eleven years of the pendency of the Pennsylvania action, leaves that State for the pnrpose of avoiding the legal effect of that suit upon her there, and rushes into New York to sue Mr. Bell here, rather than go into Pennsylvania and answer, where her rights could have been fully protected. The referee gives great sanctity to her three weeks' residence here, in face of these facts, a residence by which New York law puts South Dakota to blush. Mrs. Bell's determined stand against divorce for eleven years in Illinois, was only suddenly changed when she was served in that State, early in November, with notice of pendency of the Pennsylvania action. From every point of view the Pennsylvania judgment has more justice, legal right and honor in it.

"Full Faith and Credit" will be as a Magna Charta to American Jurisprudence.

I have argued as to the logic involved in the present philosophy of New York's divorce law. I have said that the people could understand it, if its courts refused to admit foreign divorces if granted for grounds other than our one ground, as in Lolley's case in 1812.

The people could understand it if, further, New York had refused to recognize as legal marriages those contracted in other States by defendants found guilty of adultery in this State, on the ground they left this State to evade its statute.

Such a decision would protect the citizens of New York and Justice would still hold the *substance* of this question in the hollow of her hand. But what avails the present state of our case law to wives or children now? What avails it to a woman to be told her husband's divorce in a foreign State is not valid here, when he can remarry in the State of his new domicile, and return with his new wife, and live with her in the same street, next door to his former wife. Wife number one clutches the shadow presented to her by the logic of the Baker case, but the substance and the life of law, which inherently protects rights which are of value, is not with her. Instead of being protected by the Baker case, she is, in fact, injured by it; children are injured by it; property rights confused by it.

If this great court would hold that "full faith and credit" should be given to each State's judgments it would bring a great peace upon the land. Evils utterly irremedial now, would be remedied then. A state of law which every able lawyer and jurist admits in private to be disgraceful would be forever removed. *Uniform divorce law will not cure* this conflict of judgments as well as of laws. The evils of divorce have nothing whatever to do with the question at bar. Those evils to children and innocent wives or husbands are terribly augmented by the present decisions.

If this court should hold valid everywhere those judgments wherein the defendant had knowledge of the pendency of the action though *pure* reason does not even require that, will any wrong follow, commensurate with the great benefits conferred?

Is it any hardship that one should have to go outside one's State to defend? In most cases there is no defense or no wish to defend. Love has long been dead. If any injustice *is* intended by the action let the defense be put in once for all, having the opportunity given it, or else forever after hold its peace.

I respectfully submit that the judgment in this case should be reversed.

HENRY H. SEYMOUR,
Counsel for Plaintiff in Error.

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